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Supreme Court of the United States

OCTOBER TERM—1958.

No. 960

UNITED STATES DREDGING CORPORATION,

Petitioner,

against

JULIA NORA McMAHON KROHMER, as Administratrix of the Goods, Chattels and Credits of George William Krohmer, deceased.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD J. BEHRENS,
Proctor for Respondent,
70 Pine Street,
New York 5, N. Y.

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Statement of the Case

In December, 1955, and for many years previously the petitioner had a single piece of business, venture or enterprise, namely, the dredging of Huntington Harbor, Suffolk County, New York, in accordance with the terms of an agreement, modified from time to time, with the Trustees of the Town of Huntington. In connection with this, its only business, it owned and operated in Huntington Harbor and the area, a substantial group of vessels all centered about and assisting a dredge, the "Magic City." The dredge was dumb and it was physically impossible to conduct the dredging operation without the dredge being tended by various barges, crane boats, launches, etc. Among these vessels was an oil screw, the "Nip," which was listed in the records of the Custom House of the Port of New York as a "dredge tender." (The details of the operation will be stated hereinafter.)

On December 22, 1955, George William Krohmer and Harry George Perkins, both in the employment of the United States Dredging Corporation, were sent aboard the motor launch "Nip" from the dredge "Magic City" by Edward J. Leifheit, the superintendent of all operations of the petitioner, to go to Cold Spring Harbor, New York, not far to the west of Huntington Harbor where the dredging was being performed, there to pump a barge, "U.S.D. No. 2," and thereafter bring the barge to a mooring in the area of the dredge "Magic City," where the barge could continue to be used in the dredging operation.

When the "Nip," which was a small vessel of about 32' in length and a beam of less than 12', was proceeding through the ice with the snow falling and her deck covered with ice in Cold Spring Harbor, the engine began to overheat as usual and was shut off. Alcohol fumes were detected coming from the engine room forward. Krohmer, who was navigating the vessel, went into the engine room ostensibly to relieve the overheated engine and as he came out on deck, there was an explosion which blew Krohmer and Perkins into the icy waters of Cold Spring Harbor. The two men struggled for about half an hour. There were no railings on the "Nip" onto which the men could take hold to re-board the vessel, although after the explosion the petitioner put rails on the "N o." Eventually Perkins was rescued but Krohmer drowned. He was a young man, survived by a 26 year old widow and three children, ranging in age from three months to seven years. On March 24, 1956, his body floated to the surface.

The widow having been appointed as administratrix of the Krohmer estate, a suit was filed by her in that capacity in the United States District Court for the Southern District of New York on August 10, 1956. The complaint contains as the first cause of action against United States Dredging Corporation, allegations under the Jones Act, (46 U.S.C. 688). Therein it is alleged that in the month of December, 1955, the defendant (petitioner here) used the dredge "Magic City", the oil screw "Nip" and other

vessels, each of which it owned, operated, managed and controlled, in connection with the dredging operation at Huntington Harbor and Cold Spring Harbor; that on December 22, 1955, while he was acting within the scope of his employment by the petitioner, Krohmer suffered personal injury aboard the "Nip" resulting in his death; that the injury and death were caused by the negligence, carelessness and recklessness of the defendant (petitioner here); damage of $500,000 is sought in the first cause of action for the pecuniary loss sustained by the widow and three children.

The second and third causes of action are for damages in the sum of $100,000 for Krohmer's conscious pain and suffering from the time of the explosion until the time of his death by drowning. The second cause of action is based upon allegations of negligence on the part of the defendant (petitioner here) while the third cause of action is predicated upon allegations of unseaworthiness of the oil-screw "Nip."

After the service of the summons and complaint upon the United States Dredging Corporation, there was served upon proctors for the Krohmer estate a restraining order previously issued *ex parte* by the United States District Court for the Eastern District of New York. It is the order ending that limitation proceeding, unanimously affirmed by the Court of Appeals for the Second Circuit, which is the subject matter of the petition.

The limitation proceeding in the Eastern District had been instituted on July 6, 1956 by the filing of a petition under 46 U.S.C. 183 and in the petition it was alleged that the petitioner feared that claims would be asserted by the Krohmer estate and by Perkins in excess of the value of the launch, namely, $20,000. (Actually the petitioner knew, but did not reveal to the Court, it had nothing to fear from Perkins. It had already arranged with Perkins to satisfy his claim.)

The petitioner did not disclose to the District Court the fact and gave no intimation that the "Nip" was only a tender to the dredge "Magic City" and that its dredging venture or enterprise had as integral parts of the whole, not only those two vessels but also the "Tuck," the "New Harbor" and others. Based upon the petition, the District Court signed an order for an interim stipulation of $20,000 on July 10, 1956 and a stipulation in that amount, in the usual form, was filed on the same day. Simultaneously, the Court signed an order for the issuance of a monition and the usual *ex parte* restraining order, enjoining all legal proceedings except in the limitation proceeding. The monition was returnable on September 12, 1956.

Before the return date of the monition, proctors for the Krohmer estate obtained an order to show cause in the Eastern District for an order dismissing the petition or in the alternative requiring the petitioner to surrender the dredge "Magic City" and other vessels engaged in the common venture or enterprise, or their value, pursuant to the Admiralty Rules of this Court. In that order to show cause, it was provided that the time of the Krohmer estate to answer the petition and to file a claim was extended for twenty days after the entry of an order finally disposing of the motion. To the surprise of no one, the return date of the monition came and went and Mr. Perkins filed neither answer nor claim. No claim was ever filed by anyone in the limitation proceeding.

On October 22, 1956, the Court in the Eastern District signed an order referring the matter to a Commissioner for the purpose of taking testimony and reporting his opinion to the Court whether the "Nip," the "Magic City," the "Tuck," the "New Harbor" and four other named vessels "were engaged in a single venture or common enterprise during the year 1955 and especially on December 22, 1955."

Hearings were held before the Commissioner at which various documents were presented as well as the oral tes-

timony of many witnesses. The Commissioner filed his report on April 25, 1958. He concluded, and so reported to the District Court, that the oil screw "Nip," the dredge "Magic City," the oil screw "Tuck," the launch "New Harbor," the barge "U.S.D. No. 2" and the barge "Roy H" were all engaged in a single venture or common enterprise during the year 1955 and especially on December 22, 1955 and must be held as one vessel for the purpose of the undertaking in which the petitioner was engaged. He also reported that the "Stockton" and the "Arthur McCabe", while not named in the order of reference, were also engaged in that same common enterprise, as the testimony taken before him had revealed.

The petitioner filed exceptions on May 2, 1958 and thereupon the Krohmer estate made a motion under date of May 6, 1958, to confirm the Commissioner's report, to dismiss the petition unless the petitioner surrendered the dredge "Magic City" and the other vessels named or, their value, within ten days after service of a copy of the order to be entered with notice of entry and upon the election by the petitioner not to surrender the vessels or their value within ten days, to vacate and set aside the injunctive provisions against suit contained in the *ex parte* order of the Court dated July 10, 1956, which had held up the law suit in the Southern District of New York for almost two years. At the same time the Krohmer estate noticed the petitioner's exceptions for hearing and requested that the Court overrule them. Those exceptions were based in substance upon the same erroneous factual situation as that presented by the petitioner here, namely, the non-existent but alleged terms of Krohmer's employment by the petitioner changed the nature of the petitioner's venture.

The District Court confirmed the Commissioner's report with an opinion, saying of the report it "sets forth the facts at length and his review of the testimony is lengthy and to the point. His conclusion of law based upon the cases cited is manifestly correct. His report makes the following recommendations: The Oil Screw *Nip*, the

Dredge *Magic City*, the Oil Screw *Tuck*, the Launch *New Harbor*, the Barge *U.S.D. No. 2* and the Barge *Roy H.* were undoubtedly engaged in a single venture or common enterprise during the year 1955. His report as to those vessels is confirmed." (The Court felt that since the "Stockton" and "Arthur McCabe" were not named in the order of reference, they should not be surrendered and it was admitted that the "U.S.D. No. 1" and the "Billy," named in the order of reference, had not been established as part of the venture or enterprise with the other vessels. The Krohmer estate did not feel substantially aggrieved by such disposition concerning the "Stockton" and "McCabe" because the value of the dredge and the five other vessels engaged in the enterprise exceeds the amount of the Krohmer estate's claim in the litigation pending in the United States District Court for the Southern District of New York.).

In the affidavit submitted in support of the aforesaid motion, proctors for the Krohmer estate pointed out that if the petitioner surrendered the additional vessels or their value within the time to be specified in the order, the Krohmer estate would file an answer and claim in the limitation proceeding and would thereafter move to modify the restraining order upon compliance with the usual conditions. Thereafter the Krohmer estate could dismiss the whole limitation proceeding on the merits by showing the "Nip" was unseaworthy, which she obviously was. It was also stated that if the petitioner should decide to accept dismissal of the petition (and this turned out to be the petitioner's election), the restraining order would still technically be in existence. In that circumstance, there was no reason why the administratrix should not then proceed with her action at law in the Southern District without any argument, specious or not, by the petitioner that there might be yet some life in the injunction, even though the proceeding wherein it had been granted *ex parte* stood dismissed. To avoid any further delay in the

adjudication of the substantive rights of the widow and children, the moving papers requested that the Court enter an order definitely vacating and setting aside the *ex parte* injunction of July 10, 1956, if the petitioner accepted dismissal of the petition.

By order dated June 23, 1958, the Eastern District Court confirmed the Commissioner's report and overruled the petitioner's exceptions. It was provided in the order "that the petition herein be and it hereby is dismissed unless the petitioner surrenders the dredge "Magic City," the oil screw "Tuck," the launch "New Harbor," the barge "U.S.D. No. 2," and the barge "Roy H" or their value, pursuant to the Admiralty Rules of the Supreme Court of the United States within ten (10) days after service upon proctors for the petitioner of a copy of this order with notice of entry. * * *"

The order also provided that "upon the failure of the petitioner to surrender the dredge "Magic City," the oil screw "Tuck," the launch "New Harbor," the barge "U.S.D. No. 2," and the barge "Roy H" or their value, within ten (10) days after service upon proctors for the petitioner of a copy of this order with notice of entry as aforesaid, the injunctive provisions against suit contained in the order of this Court dated July 10, 1956, be and they hereby are vacated and set aside."

The petitioner chose to accept dismissal of the petition by permitting the ten day period of grace granted by the order of dismissal to expire without surrendering any additional vessel or its value. The order with notice of entry having been served, the petitioner served and filed on the tenth day an appeal from the order of June 23, 1958 "vacating and setting aside an injunction entered July 10th, 1956, and from each and every part of said order as well as from the whole thereof." Thus, the appeal brought up for review by the Court of Appeals for the Second Circuit the entire order.

Before the Court of Appeals the petitioner (appellant there) admitted, as it does in its petition here, that this Court has established definite and separate rules to be applied in "claims arising in tort and those arising out of contract." (Petition, p. 12.) It urged there that as matter of fact "the contract between petitioner and claimant (*sic*) related only to the *Nip* and only the *Nip* or its value should be surrendered." (Brief, p. 7, in the Court of Appeals.) The Krohmer estate demonstrated to the Court of Appeals that the record showed that such an assumption of fact was not factual. (Brief, pp. 13-19, in Court of Appeals.)

The Court of Appeals rejected (as the Commissioner and the District Court had done) the petitioner's presentation of the "fact" and said "The owner (petitioner) had assumed 'contractual obligations' with the claimant (respondent), and that involved any ships that it devoted to the performance of its contract with a third person." (Appendix to Petition, p. 19.)

Having referred to and explained the four cases presented by the appellant (petitioner here), the Court of Appeals unanimously affirmed the order.

After the *ex parte* injunction against suit was vacated by the District Court, and after the petitioner sought a blanket stay of proceedings pending the appeal to the Court of Appeals, a limited stay was entered pursuant to which the Krohmer estate was permitted to prepare for the trial of the action in the Southern District of New York but the actual trial was stayed. Such preparation was made by depositions and other usual pre-trial proceedings. The case is now on the trial calendar awaiting trial, all stays having expired upon the entry of the order on mandate from the Court of Appeals. The disposition of the pending petition for a writ of certiorari will, at long last, permit a trial on the merits of the Jones Act suit, the real controversy between the parties.

Reasons Why the Cause Should Not Be Reviewed

(1) The petition points to nothing, either expressed or implied in Rule 19 of this Court, which warrants a review of this case; the petition actually seeks to have this Court review all of the testimony and documents and then hold, as a threshold *fact* proposition, that Krohmer and the petitioner's other dredging employees were each hired to work exclusively on one particular vessel, isolated from the dredging operation as an entity, which is exactly the contrary of what the Commissioner, the District Court and the Court of Appeals uniformly and unanimously held the situation to be on the basis of overwhelming and undisputed oral and documentary proof.

(2) The basic meaning of the Limitation Statute has long ago been settled by this Court; admittedly the decisions of the courts below are not in conflict with the applicable decisions of this Court but rather are in entire accord with those decisions; the petition seeks no review to obtain any interpretation, modification, extension or alteration in any way of the legal doctrines unanimously promulgated by this Court in limitation cases.

(3) The Court of Appeals for the Second Circuit did not construe the Limitation of Liability Statute, liberally or in any other way; that court simply followed the statute as clearly interpretated by this Court.

(4) This case is of no peculiar interest to the industry or any segment of it.

Amplification of Reasons (1) and (2)

What is actually behind this petition, as a practical matter, is an attempt by the petitioner-employer to prevent the widow and children of its deceased employee from recovering a full award of damages, in whatever amount

a jury may fix, on a substantive trial of the Southern District action. To that end the employer tendered in the Eastern District merely a token compliance with the Limitation Statute by depositing only $20,000, the value of the "Nip", instead of the value of the flotilla which the petitioner had committed to the dredging venture. By that stratagem, with ensuing injunctions and stays, the petitioner has been able to prevent the trial on the merits of the Jones Act suit filed in the Southern District of New York almost three years ago.

The basic statute providing for the limitation of liability of vessel owners (46 U.S.C. 183) under certain circumstances, having been in effect since 1851, the question of what vessel or vessels must be surrendered in the proceeding, under varying fact situations, has long since been resolved by this Court. Two rules have been evolved, namely, (1) if the injured party is legally a stranger to the shipowner, their relationship arising purely in tort, only the "offending vessel" need be surrendered (*Liverpool, Brazil & River Plate Steam Navigation Company* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, decided in 1919) and (2) if there is a contractual or consensual relationship between the injured party and the vessel owner, the whole flotilla committed by the owner to the enterprise must be surrendered. (*Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, decided in 1927.)

Research discloses no reported case in the Courts of Appeals during the intervening span of over thirty years, where the distinction between the two types of cases has not been appreciated. In the Second Circuit the difference is frequently expressed. For example, in *Deep Sea Tankers, Ltd.*, 258 F. 2d 757, a case involving alleged crowding by certain vessels and interference with the navigation of the libelant's vessel so as to cause her to ground, the Court followed the *Liverpool* collision rule and said:

> "Those cases cited by appellants, in support of their position that the passive instrument as well must

be surrendered, involved a breach of contract where the libelant had entered into a contractual agreement with the respondent, either for the transportation of himself and his goods, *The Big Chief*, E. D. Mo., 75 F. Supp. 496; see also, *The Columbia*, 9 Cir., 73 Fed. 226, or of employment, *Standard Dredging Co.* v. *Kristiansen*, 2 Cir., 67 F. 2d 548. As no such contractual relationship existed between any of the libelants and either the Railroad or Metropolitan, the cases cited by appellants are not in point. * * *"

On January 12, 1959, certiorari was denied, 358 U. S. 934.

The question of which rule should apply to the case of a seaman, injured while working in a dredging operation which was practically identical with the one involved in the case at bar and who had brought suit against his employer under the Jones Act (46 U.S.C. 688), was presented to the Second Circuit in 1933 in *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548. Judge Learned Hand, for a unanimous bench, applied the *Salz* rule, saying: "In view of this language (referring to the *Salz* case) and of the use made of *The Columbia*, *supra* (CCA), 73 F. 226, when the duty involves 'contractual obligations,' the whole flotilla embarked in the enterprise is the 'vessel'; a conclusion which would comprise not only the barge here, but the two attending tugs as well." And, further, of the argument that the consensual relationship of master and servant might be obscured by the remedy sought or by some strict construction of the law of contracts, he wrote: "We do not so understand *Sacramento Nav. Co.* v. *Salz Co.*, *supra*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663; rather we read it as meaning that when the duty violated, although imposed by law, presupposes at least the relation of master and servant, the owner must surrender all those vessels which share in the execution of the venture; collectively they are 'such vessel' within R.S. 4283 (46 USCA § 183)."

Certiorari was denied, 290 U. S. 704.

In Judge Learned Hand's opinion in the case at bar, again he recognized the separate rules as exemplified by *Deep Sea Tankers*, on the one hand, and by *Salz* and *Kristiansen* on the other. The Court reviewed the facts extensively (Appendix to Petition, pp. 16-18) and, since the case is factually the twin of *Kristiansen*, applied the *Salz* rule.

The petition recognizes the clear rules, of *Salz* (Petition, p. 9) and *Liverpool* (Petition, p. 13) and the distinction "between claims arising in tort and those arising out of a contract" (Petition, p. 12). It suggests no review of the law. The core of the petition is simply a quarrel with the facts, or perhaps more aptly, the insistence upon presenting as a fact that which is exactly the contrary of the fact.

Under the heading of "Questions Presented" (Petition, p. 2) the petitioner says the issue is what vessels should be surrendered "when the loss involved solely an employee whose duties were performed exclusively aboard one vessel and had no concern with the other vessels which the owner used to perform the contract with the third parties."

The petitioner never offered any written or formal employment contract involving Krohmer or anyone else at the hearings before the Commissioner and it seems obvious in the nature of things that none ever existed. However, the unimpeached testimony before the Commissioner demonstrated that, in fact, Krohmer's job was not exclusively to work aboard the "Nip" nor was the job of anyone working for the petitioner in the dredging operation exclusively referable to any vessel. Objectively, every one of the employees was engaged in a common enterprise, that is, the dredging of Huntington Harbor, and within the limitations of the ability, training and experience of each individual he did whatever work he was directed to do, wherever it was required to further the overall operation of dredging.

While each employee of the petitioner had a job or rating which was defined, each was not put in any unexceptionable category. One would hardly expect that, in view of the fact that they were all working in a common enterprise with Leifheit being in charge of everything (Appellant's Appendix, 44). Specifically, he was the boss of the men who operated the "Nip", the "Tuck" and the "New Harbor" (Appellant's Appendix, 46). Yet the Ericksen brothers on the dredge "Magic City" would tell the "Nip" or the "Tuck" which scows to bring next. When the "Nip" was ordered to do odd jobs, the orders came from them or Leifheit (Appellee's Appendix, 101, 114). The trimming of the scows was performed by the dredge's deck hands (Appellee's Appendix, 71, 84). While Krohmer was regularly assigned to the "Nip", he did operate the "Tuck" and the "New Harbor" as required (Appellee's Appendix, 85, 86). On occasions Hansen, an engineer on the dredge "Magic City", operated the "Nip", the "Tuck" and the "New Harbor" (Appellee's Appendix, 112). At times Hansen worked on the "Stockton" and the "Roy H." (Appellee's Appendix, 111) and the repair crew of the dredge (identified at Appellee's Appendix, 119) would work aboard the derricks, scows, the "Nip", the "Tuck" and the "New Harbor" (Appellee's Appendix, 120). There was additional specific testimony before the Commissioner as to the repair of the "Nip" and the "Tuck" (Appellee's Appendix, 80, 111, 120, 134). A deck hand from the dredge "Magic City" would be on the "dumper" when it was taken away from the dredge (Appellee's Appendix, 131). The logs of the "Nip" and the "Tuck" were kept on the dredge (Appellee's Appendix, 117, 118). Perkins, a deck hand on the dredge "Magic City" sometimes worked on the crane and on the scows and was working on the "Nip" at the time of the explosion (Appellee's Appendix, 66, 73, 74, 75, 76). Indeed, he worked on all the other ships in the operation as required (Appellee's Appendix, 85). Like homing pigeons, the

"Nip", the "Tuck" and the "New Harbor" were tied up at the dredge "Magic City" every night (Appellee's Appendix, 134). The dredge had a night watchman aboard 365 days a year (Appellee's Appendix, 124). He operated the three vessels to and from the dock (Appellee's Appendix, 124, 125). The deck hands of the "Magic City" put equipment aboard the "Roy H" at the town dock and when the "Roy H" was towed, Perkins would become a deck hand on the "Nip" or the "Tuck" (Appellee's Appendix, 73).

The Commissioner said (Appellant's Appendix, 34):

> "Although the decedent did not sign articles to serve on any particular vessel, he was nevertheless, assigned as launchman for the *Nip*. However, there were occasions when he worked aboard some of the other vessels. He was an employee of the petitioner and worked for it in its dredging of Huntington Harbor and Huntington Bay. Petitioner contends that the decedent could be likened to a deck hand of an independent tugboat assigned to tow a flotilla of barges or assist in the docking of an ocean going liner. These jobs arise and are completed over the period of a day or two or within a short time. In the case at bar this dredging operation had been in progress for many years, being carried on by the *Magic City* in conjunction with the *Nip* and a number of other attending craft, without which, as Mr. Leifheit testified U. S. Dredging could not fulfill the contract to dredge Huntington Harbor and Huntington Bay and that the *Magic City* could not operate without the assistance of these attending vessels, including the *Nip*."

All of the petitioner's employees were actually hired to work and did work in the dredging operation. To isolate the work of any employee, as the petitioner contin-

ues to try to do, from that of the entire operation is simply not realistic because it fragments a factual entity. The very foundation of the petition is contrary to the facts found by the Commissioner, the District Court and the Court of Appeals.

Concurrent findings of fact by the District Court and the Court of Appeals are adopted here as a conclusive basis for decision in the absence of plain error or no evidence at all to support the findings.

Virginian Ry. Co. v. *System Federation*, No. 40, 300 U. S. 515, 542;
Williams Mfg. Co. v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367;
Texas & N.O.R. Co. v. *Brotherhood Ry. & S.S. Clerks*, 281 U. S. 548, 558;
Alabama Power Co. v. *Ickes*, 302 U. S. 464, 477;
Corn Products Co. v. *Commissioner of Internal Revenue*, 350 U. S. 46, 50, 51.

This Court has said in *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275:

> "• • • A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error (citing cases)."

The Court of Appeals has followed and applied *Kristiansen* in the case at bar because they are essentially identical on the facts.

From the inception of the Krohmer estate's attack upon the limitation petition, it was an open secret that its course would be set by reference to the adjudication of the *Kristiansen* case. This was obviously indicated because *Kristiansen* involved a dredging operation during which a seaman was injured and sued under the Jones Act.

Accordingly, the Krohmer estate proved before the Commissioner, not only all of the basic facts demonstrated in *Kristiansen*, but so much more that the Commissioner reported "The facts here indicate a stronger case for decedent's estate than the injured party had in the *Kristiansen* case" (Appellant's Appendix, 38).

Prior to 1933, when *Kristiansen* was decided, there had been considerable litigation involving which vessel or vessels were required to be surrendered before the owner could avail himself of the limitation of liability set forth in 46 U.S.C. 183. Such litigation had resulted in the *Salz* and *Liverpool* rules as stated before. Where the person injured was a stranger to the shipowner and the only relationship between them was that of *tort-feasor* and injured party, only the "offending vessel" was required to be surrendered. The classic and most frequent example was to be found in collision cases where the usual problem was whether vessels being towed at the time of collision were required to be surrendered with the tug. In such instances the words "offending vessel" are peculiarly apposite. On the other hand, where the relationship between injured person and the ship owner was *contractual*, the question of which vessel might be called an "offending one" was of no importance. The rule had developed that where there was a breach of duty by the owner incident to a contractual arrangement (such as master and servant or agreeing to transport cargo, etc.) then all vessels engaged in the undetaking were to be surrendered as "such vessel."

In *Standard Dredging, supra*, Kristiansen sued his employer, National Dredging Co., in the State court, under the Jones Act for personal injuries suffered on a barge. In substance, his complaint alleged that while he was employed as a seaman on a dredge which was owned by the defendant he was sent to a barge nearby which was used as a tender to supply oil to the dredge. He asserted that

this barge, which was owned by his employer, was unseaworthy due to an uncovered and unlighted hatch and also that her hatch covers were defective. In the complaint it was asserted that the master of the dredge directed him to board the barge at night and that while he was on the barge he fell through the hatch sustaining personal injuries. His employer filed a petition to limit liability (the position of Standard Dredging Co. in that case seems immaterial and will not be referred to herein) and procured the usual injunction against Kristiansen's maintaining the action at law. Certain fact issues were raised, sent to a Commissioner and, after having been resolved, the District Court rendered its order. Judge Byers dismissed the petition unless the owner surrendered the dredge as well as the barge, which it had already surrendered in the limitation proceeding. The owner did not surrender the dredge but after the time for doing so had expired, took an appeal.

In the statement of facts, Judge Learned Hand there said:

> "The barge was being used upon the same business as the dredge; she supplied oil not only to her, but to two attendant tugs which assisted in the operation. Occasionally she would go to shore to have her tanks filled, but usually she lay near the dredge, and was moved along side of, and served, the dredge or the tugs, as occasions demanded; she was therefore a part of the flotilla engaged in the venture, as were the tugs also."

While the Court of Appeals, in affirming Judge Byer's order, actually required only the surrender of the dredge, since that was all Kristiansen sought to achieve, it was clearly implicit in the decision and the opinion that had Kristiansen sought the surrender of the tugs too, such surrender would have been required.

At this point, reference should be made to the similarity of the facts in the case at bar and in the *Kristiansen* case. In *Kristiansen* the injury took place on a tending barge. In this case the injury took place on the tending oil screw "Nip." In the *Kristiansen* case the tending barge had already been surrendered. So, too, was the tending vessel surrendered here. In the *Kristiansen* case the duties performed by the barge were as stated. In the case at bar the same duties for this dredge were performed by the barge "Roy H." In the *Kristiansen* case there were two tugs performing certain services for the dredge. In the case at bar the same services were performed by the "Nip," the "Tuck," and the "New Harbor."

In the course of his writing in *Kristiansen* and after exploring some of the possible historical phases of limitation of liability, Judge Hand pointed out that in some aspects, "a natural course might be to require the surrender of the vessel on which the wrong occurs; but the decisions in the lower courts scarcely bear that out." He then referred to *The Bordentown*, 40 F. 682, *The Columbia*, 73 F. 226, and *Thompson, etc., Ass'n* v. *McGregor*, 207 F. 209. In any event, Judge Hand was of opinion that one no longer need speculate on the historical aspects of the matter nor distinctions between invited persons and employees because this Court had settled the problem in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (Petition, p. 9). In so doing this Court had plainly distinguished *Liverpool, Brazil, etc.* v. *Bklyn. Eastern Terminal, etc.*, 251 U. S. 48 (Petition, p. 13), which had been concerned with "a pure tort; no contractual obligations were involved." In the *Kristiansen* case, the owners had rested very heavily upon the *Liverpool* case in the Court of Appeals (see Brief for Appellant there, pp. 13, 21 and 29). Neither in their main brief nor in their reply brief did the appellant in *Kristiansen* ever write concerning the *Salz* case which was referred to at pages 30, 38, 40 and 41 of the Brief on Behalf of Claimant-Appellee.

The issue thus tendered to the Court of Appeals in *Kristiansen* was exactly that issue which is really involved here. Judge Learned Hand concluded that, "In view of this language (referring to the *Salz* case) and of the use made of *The Columbia, supra* (1 CA), 73 F. 226, when the duty involves 'contractual obligations,' the whole flotilla embarked in the enterprise is the 'vessel'; a conclusion which would comprise not only the barge here, but the two attending tugs as well."

In *Kristiansen* the Court explored the significance which should be attributed to the existence of a physical connection of the craft. The Court concluded that such connection, which was commonly found in the towing cases, was purely accidental and without legal significance. The Court said: "When, however, the unity of the vessels is made to depend upon their devotion to a single venture, it would be egregious to introduce a purely fortuitous condition which can have no rational relation to the interests involved. We conclude that separation is immaterial."

The final phase of the Court's opinion in *Kristiansen* dealt with the contractual aspects of the matter. Remembering that the basis of the complaint was under the Jones Act and accordingly a master and servant relationship was involved, the Court said that it was entirely clear National Dredging Co.'s duty to Kristiansen involved contractual obligations. This relationship could not be obscured by the form of remedy which a servant might seek since the fact remains that an employer-employee relationship is consensual and cannot be narrowly based upon any strict construction of the law of contracts. The Court said: "We do not so understand *Sacramento Nav. Co. v. Salz Co., supra*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663; rather we read it as meaning that when the duty violated, although imposed by law, presupposes at least the relation of master and servant, the owner must surrender all those vessels which share in the execution of the venture; collectively

they are 'such vessel' within R. S. § 4283 (46 USCA § 183).".

This Court denied certiorari, 290 U. S. 704.

Apart from the rationale of the *Kristiansen* decision, reflection should indicate the underlying fairness, equity and propriety of requiring an owner such as this petitioner to surrender all vessels engaged in a common enterprise. The obligation which United States Dredging owed to George Krohmer as an employee included the obligation to furnish him a safe place where he might work. Upon a violation of that duty, Krohmer, in his lifetime, and the administratrix, after his death, were given a right by Federal statute to collect the full measure of damage. Congress has given the owner of vessels the right to limit liability to the value of his interest therein so that the owner's other assets cannot be reached, assuming that all of the conditions governing the right to limitation of liability are present. In Krohmer's case, he might have been injured on the dredge or one of the dump scows or on the crane or on the "Nip," as he was. The accidental place of the occurrence of injury cannot reasonably form the measure of the employer's obligation in dollars. Where all of the vessels are a unit and engaged in a single enterprise as matter of fact, there could be no sensible justification for cutting the whole into its integral parts and limiting the owner-employer's responsibility to that small part of the whole aboard which fortuitously an accident occurred.

The petitioner does not read *Kristiansen* correctly because, among other things, it fails to appreciate what a Jones Act suit actually involves. The Krohmer estate's action in the Southern District of New York, using the Jones Act as a death statute, is not an action for breach of contract. It is not an action for breach of contract of carriage such as *Pratt* (Petition, p. 8). It is especially not an action for breach of the contract which appellant

had with the Trustees of the Town of Huntington. That contract was received in evidence before the Commissioner only to explain *what the petitioner was doing, what venture or enterprise it was actually engaged in when Krohmer was killed.* The important fact is not that the petitioner was dredging *for the Town of Huntington,* whereby all its vessels were engaged in a common enterprise or joint venture. The important fact is that all of the vessels *were engaged in the dredging operation.*

The heart of every Jones Act suit, whether for injury or death is negligence. The Jones Act incorporates by reference the provisions of the Federal Employer's Liability Act, 45 U.S.C. 51 *et seq.* That statute specifically refers to negligence. This Court has written over and over again that the foundation stone upon which every Jones Act suit rests is negligence.

> *Engel* v. *Davenport,* 271 U. S. 33;
> *Jamison* v. *Encarnacion,* 281 U. S. 635;
> *DeZon* v. *American President Lines,* 318 U. S. 660.

While the *relationship* is contractual, the obligation of the employer is in no sense delimited by any consideration of the terms of the contract of hiring. It is injury in the course of the employment, not where the injury occurs that makes the employer responsible. For discussion of an analogous situation, see *Seas Shipping Company* v. *Sieracki,* 328 U. S. 85.

To apply, even indirectly or remotely, to a Jones Act claim any ideas of an "offending vessel" as the petitioner does, is totally erroneous. One asserting a Jones act claim has no claim *in rem* against any vessel, cannot libel her and must proceed *in personam. Plamals* v. *The Pinar Del Rio,* 277 U. S. 151.

The argument at Petition, page 10, about the "Nip" being supplied "under the contract between petitioner and

the deceased" is absurd. The petitioner was hardly engaged in the "venture" of affording employment to the decedent or a means of transportation, like a passenger on a ship. Its enterprise, its business, its venture was dredging Huntington Harbor. It was in *that* enterprise all of its vessels and employees were working together as an integral whole.

The appellant's conjecture about the basis of *Kristiansen* at Petition, page 11, relating to the seaman's duties aboard the barge lead nowhere. Would the appellant claim that *Kristiansen* had work to do on the tugs too? Yet, the Court of Appeals said the whole flotilla was embarked on the venture, "a conclusion which would comprise not only the barge here, but the two attending tugs as well."

It should also be pointed out that in the Jones Act suit pending in this case, the plaintiff (respondent) is not restricted in any way by a pleading referable to the "Nip" alone as the petitioner argues at Petition, page 10. The dredge "Magic City", the oil screw "Nip", the oil screw "Tuck" and the two barges are all referred to in the complaint (Appellant's Appendix, 12, 13) and the fault of the employer could as well consist of a negligent order issued by the employer on land as of a deficiency in any of the vessels engaged in the enterprise.

The case at bar is on all fours with *Kristiansen* and the disposition below should be totally affirmed by a denial of the petition.

Amplification of Reason (3)

The petition asserts as a question presented whether the Statute was "given a liberality of construction by the United States Court of Appeals. . . ." Actually, the Court of Appeals embarked on no "construction" at all. What it actually did was (a) pointed to the different rules promulgated by this Court in *Salz*, which it followed in *Kristiansen* and *Liverpool*, which it applied in *Deep Sea*

Tankers; (b) explained why *The George W. Pratt*, 76 Fed. (2) 902, is factually different, and (c) explained how the case at bar is factually the same as *Kristiansen*.

The petitioner repines here that the result of the decision below is to remove "much of the benefit conferred upon ship owners by the statutes" (Petition, p. 12). That is simply not so. The District Court's order required the petitioner only to surrender the value of the vessels which it had committed to the enterprise of dredging Huntington Harbor. Its other assets are insulated by the law and thereby the petitioner received the full measure of what the statutes envisage. It would not take the petitioner very long to find concrete benefit in the order of the District Court, if six or seven employees had died in the explosion aboard the "Nip", rather than one. The petitioner's lamentation arises only because the dollar value of the wrong it committed against Krohmer, his wife and children is less than the value of the petitioner's interest in its vessels engaged in the common enterprise or single venture. Its argument that it has been handled unkindly by the courts below because its negligence killed but one, rather than many, is hardly lachrymatory.

The appellant complains that requiring a shipowner to surrender all its vessels engaged in a common venture "would mean that a shipowner could never limit his liability to any value less than all vessels engaged in the common venture * * *" (Petition, p. 14). Where a seaman employee is injured or killed, that is exactly what the law is, according to this Court in *Salz*. The petitioner merely does not approve the law which it invoked when, as petitioner, it filed its petition in an abortive attempt to deprive the Krohmer widow and children of what the Jones Act says is rightfully theirs.

If this petition is to be adjudged on some question of maritime policy, it is respectfully suggested that the day of exalting insured property rights over human rights has long since passed. The policy now is not to be shaped

by needless concern for "poor" shipowners (government subsidies or insurance policies take care of that problem, where it exists) but rather the requirements of the human beings who are maimed and killed while furthering the employer's interest in a maritime enterprise. The employers can only lose their ships—the seamen their lives. The policy in the last quarter of a century is to be found in cases like *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96; *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85; *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; *Rogers* v. *Missouri Pacific Railroad*, 352 U. S. 500; *Webb* v. *Illinois Central Railroad Co.*, 352 U. S. 512; *Herdman* v. *Pennsylvania Railroad Co.*, 352 U. S. 518; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 and *Kernan* v. *American Dredging Company*, 355 U. S. 426.

Salz, followed by *Kristiansen*, is basic law and because it is, the petitioner's feigned alarm now sounds rather hollow as it echoes back to 1927 and 1933, when it was held to be inconsequential.

Amplification of Reason (4)

As the foremost reason for allowance of the writ, the petitioner asserts the "question affects the entire shipping industry in the United States" (Petition, p. 6). This seems to be based on some expectation that the opening of the St. Lawrence Seaway will increase dredging operations, as the result of which more seamen may be killed by the negligence of their employers (Petition, p. 7). On that basis a writ of certiorari should now be granted to review the facts in every Jones Act suit, the facts of every maritime collision and the facts in every case of cargo damage involving a ship.

Although this case has been litigated for almost three years, no one has sought leave to appear as *amicus curiae*

at any stage of the matter in any court. Obviously, this case has been resolved on its own facts, the applicable law having been stated by this Court over thirty years ago. It has no peculiar impact upon anyone in the shipping industry unless, perchance, some shipowner in the future, in conducting a dredging operation, uses an unseaworthy vessel as part of a flotilla as the result of which an explosion kills his employee. Such a member of the industry can read his obligation under the Limitation Statute by referring to *Salz* and *Kristiansen*.

Additionally the industry knows the Statute is largely an anachronism. Judge Learned Hand concluded his opinion in the case at bar with the sentence—"However, it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete; and certainly we should now have no warrant for extending its scope, when the liability is for personal injury arising from the shipowner's fault" (Appendix to Petition, p. 19).

The industry also knows that at the last session of Congress, a bill was introduced to repeal this old statute and currently Mr. Morse, the Maritime Administrator, is circularizing the industry to ascertain its feelings concerning suggested modifications of the whole Limitation situation. Under the circumstances, neither the shipping industry nor any other industry cares what may happen to the widow and children of George William Krohmer, seaman, killed by the negligence of his employer while working.

Conclusion

Wherefore, the respondent, being anxious sometime to try the merits of her controversy with the petitioner at the conclusion of this unwarranted shadowboxing, and perceiving in the petition nothing to warrant review of the facts

by this Court, the petitioner having actually sought no review of law, prays that the petition for a writ of certiorari be denied, to which end this brief is

Respectfully submitted,

EDWARD J. BEHRENS,
Proctor for Respondent,
70 Pine Street,
New York 5, N. Y.

June 2, 1959.